In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE TERRITORY OF HAWAII, APPELLANT,
v.
OSAKA MANKICHI.
No. 512.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII.

BRIEF OF THE SOLICITOR-GENERAL.

STATEMENT.

This is an appeal by the Territory of Hawaii from an order of the district court of the United States for that Territory (Estee, J.) discharging the petitioner in habeas corpus proceedings, Osaka Mankichi, from further imprisonment under a conviction for manslaughter.

The question involved arises under the Constitution of the United States, and is whether, during the transition period, after the transfer of sovereignty, on August 12, 1898, under the resolution of annexation of July 7, 1898 (30 Stat., 750), and prior to the establishment, on June 14, 1900, of a Territorial government under the organic act of April 30, 1900 (31 Stat., 141), the fifth and sixth amendments of the Constitution were in

force in Hawaii, so as to render void all indictments, trials, and convictions in criminal cases under the municipal legislation of the Hawaiian Islands, which, by the express provisions of the resolution of annexation, was to remain in force until Congress should otherwise determine.

Under the Hawaiian law in force in the islands during the rule of the Republic and of the monarchy which preceded it, the grand jury and petit jury of the Anglo-Saxon system were unknown.

There were no provisions whatever for the impaneling of grand juries. An indictment was prepared by the prosecuting officer (in this case the attorney-general) and was certified to as a true bill by the judge in accordance with the following provision:

> The necessary bills of indictment shall be duly prepared by a legal prosecuting officer and be duly presented to the presiding judge of a court before the arraignment of the accused, and such judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill or not. (Section 616, Penal Laws of 1897.)

Racial and mixed juries were provided for. In criminal cases foreigners were tried by juries composed of foreigners, and Hawaiians by juries composed of Hawaiians. An agreement of nine out of twelve petit jurors was sufficient to authorize a verdict, under the following provision:

> No jury for the trial of any case, civil or criminal, shall be less than twelve in number;

but when nine of such jury agree upon a verdict they may render the same, and such verdict shall be as valid and binding upon the parties as if rendered by all twelve. (Section 1345, Civil Laws of 1897.)

On August 12, 1898, a formal transfer of sovereignty and property took place in accordance with instructions issued July 8, 1898, by President McKinley, through Secretary Day, to Minister Sewall. Under these instructions the Government of the Republic of Hawaii was continued and proceeded without interruption, awaiting the action of Congress. Copies of these instructions and the report of the transfer are printed in the appendix to this brief, the italics being mine.

On the 4th of May, 1899, the appellee, along with others, was indicted in the proper Hawaiian court, pursuant to section 616, above quoted, for the crime of murder in the first degree, the indictment being prepared by the attorney-general of the Republic and certified to as a true bill by the first judge of the circuit court of the first judicial district. At the May term, 1899, of that court the appellee was tried by a jury of twelve men, and was convicted of manslaughter in the first degree, three jurors dissenting, and was sentenced to imprisonment for the term of twenty years.

After the transfer of sovereignty (April 12, 1898) and before the indictment of the appellee, in May, 1899, the authority of the Government of Hawaii to administer the existing system of penal law, and thus

punish crime in the only way possible in the islands, was unanimously sustained by the supreme court of Hawaii in the case of *The Republic of Hawaii* v. *Edwards*, 11 Haw. Rep., 571 (decided November 4, 1898). The position thus taken was maintained unanimously by that court during the transition period. (*Republic* v. *Edwards*, 12 Haw., 55; *Peacock* v. *Republic*, 12 Haw., 27.)

The reorganization of the courts, pursuant to the organic act of the Territory, was followed by habeas corpus proceedings to test the validity, under the Constitution of the United States, of these decisions, and of course of all convictions during the transition period. On the same day two opinions of the supreme court of the Territory were filed, one holding that the fifth and sixth amendments took effect on the adoption of the resolution of annexation in 1898; the other that they did not take effect until the organization of the Territory under the organic act in 1900. This conflict was made possible by a provision of the law of Hawaii to the effect that when one of the justices of the supreme court is absent or disqualified a circuit court judge or a member of the bar may sit in his place. Chief Justice Frear and Associate Justice Galbraith held opposite views, and in the Marshall case the substitute for Justice Perry, who was absent, concurred with Judge Frear, while in the Edwards case the substitute for Judge Perry, being another person, concurred with Judge Galbraith.

Marshall, upon being remanded to the jail by the supreme court of the Territory, brought habeas corpus

proceedings in the district court of the United States. Judge Estee declined to assume jurisdiction. His opinion intimated a belief at that time that the fifth and sixth amendments did not take effect until the organization of the Territory in 1900.

After this, numerous cases of habeas corpus, including one in behalf of Osaka Mankichi, the appellee herein, were brought before Judge George D. Gear, second judge of the first circuit (Territorial) court. He held that the Constitution of the United States was extended to the islands *in toto* by the resolution of annexation, and that all the convictions during the transition period were void. On appeal, the supreme court of the Territory reversed him, Justice Galbraith dissenting, and the petitioners were remanded to imprisonment at hard labor. A petition for a writ of habeas corpus was then presented in behalf of Osaka Mankichi to Judge Estee, which he granted, having apparently changed the views which he intimated in the Marshall case. From his decision an appeal has been taken by the Territory to this court. Under like circumstances, Judge Gear, since the decision of Judge Estee, has discharged prisoners on habeas corpus, declaring that the decisions of the supreme court of the Territory violate the Constitution of the United States, and are, therefore, not binding on him.

In view of these facts, the interest of the United States in this case is apparent. Not only is it interested in preventing a general jail delivery, which will interfere with the adequate punishment of the dangerous characters who committed crimes in Hawaii during

the transition period, but it is interested in sustaining the construction which both the Government of the United States and the Government of Hawaii, in carrying out the contract of cession made by them, placed upon the resolution of annexation, and in upholding the power of Congress, under the Constitution, to continue without interruption the government and law of an independent country, annexed by agreement to the United States, with unimpaired authority for the protection of persons and property and the punishment of crime, until such time as Congress, after investigation and consideration, may be able to provide a government and law of its own.

ARGUMENT.

I.

At the time of the cession, the Hawaiian Islands constituted a sovereign and independent nation, with a government of its own, republican in form, and a civilized system of law, civil and criminal, defining rights and affording remedies. The courts were open and due process of law provided. At the same time, as in some of our States, grand juries were not used nor unanimous verdicts required to convict.

The system of criminal procedure in force is thus described by the supreme court of Hawaii in the opinion delivered by Chief Justice Judd in *Republic* v. *Edwards* (11 Haw., 571, 579):

> Grand juries have never been authorized in Hawaii. By our earliest law on the subject the prosecution of all offenses punishable by

law devolved upon the attorney-general. This law was enacted in 1847 (vol. 2, Laws of 1846–47, pp. 264, 265, et seq.) This officer was required to prepare bills of indictment, after examination of the offender, to be certified a true bill by the presiding judge, and this system has continued up to the present.

Unanimity of the jury has never been required in Hawaii. On the 5th of May, 1842, the king and chiefs passed a "law for the regulation of the courts." Section 20 reads: "When a man is tried for a capital offense, he shall not be condemned to die unless the jury is perfectly agreed. But in trials for other crimes, three-fourths of the jury shall be sufficient to decide the case." This was followed by the "act to organize the judiciary department," passed September 7, 1847. Section XXI of the act, Vol. II, acts 1846 and 1847, page 63, prescribed that "no jury for the trial of any civil or criminal case shall be less than twelve in number; but when nine of such jury shall agree upon a verdict, they may render the same, and such verdict shall be as valid and binding upon the parties as if rendered by all twelve." This provision was continued without change in the Civil Code adopted in 1859, section 1203, and is law up to the present day. The statute which enacts that a verdict by nine jurors is sufficient was held to be constitutional in *The King* v. *Andreas Camacho*, 3 Haw., Rep., 385.

By the treaty of annexation which was formally consented to by the Republic of Hawaii and submitted to this country, a cession was proposed upon certain

terms and conditions which were stated. By the passage of the resolution of annexation the offer of cession was accepted and the islands annexed "as a part of the territory of the United States" upon the terms stated in the treaty and incorporated in the resolution, which is printed in the appendix. This resolution contains special provisions with respect to the public lands of Hawaii, the customs regulations and relations of the islands, the public debt of the Republic, the immigration of Chinese, and the following general and significant provision securing the continuance of the Government and laws of the Republic during the transition period and until Congress should provide a new and permanent government:

> *Until Congress shall provide for the government of such islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons* and shall be exercised in such manner *as the President of the United States shall direct;* and the President shall have power to remove said officers and fill the vacancies so occasioned.
>
> The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. *The municipal legislation of the Hawaiian Islands,* not enacted for the fulfillment of the treaties so extinguished, and *not inconsistent with this joint resolution nor contrary to the Constitution of the United States* nor to any existing

treaty of the United States, *shall remain in force until the Congress of the United States shall otherwise determine.*

* * * * *

So long, however, *as the existing government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided* said government shall continue to pay the interest on said debt [the public debt of the Republic of Hawaii].

* * * * *

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.

These provisions clearly contemplated that the officers of the existing government of Hawaii should continue to exercise all the civil, judicial, and military powers then vested in them, and administer the Hawaiian law, for the protection of persons and property and the punishment of crime, until such time as Congress, acting upon the recommendation of the five commissioners representing both the Hawaiian islands and the United States, should frame a permanent government, under which the islands might be incorporated into the United States. The nature of the qualifications which were attached to these provisions will be considered later.

II.

That Congress had power thus to provide a temporary government, not subject to all the restrictions

of the Constitution, until it could frame a permanent government and incorporate the islands as a part of the United States, was held by this court in *Downes* v. *Bidwell* (182 U. S., 244). Mr. Justice Gray, in his concurring opinion in that case, referring to what he terms "the transition period," said (bottom page 346):

> If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the Constitution.

That the resolution of annexation did not incorporate the islands within the United States and render them subject to all the limitations of the Constitution applicable throughout the United States, was evidently the view of the justices who constituted the majority of the court in the *Downes case.* Mr. Justice Brown, who delivered the opinion of the court, says (page 256):

> So, too, in the act annexing the Republic of Hawaii, there was a provision continuing in effect the customs relations of the Hawaiian Islands with the United States and other countries, the effect of which was to compel the collection in those islands of a duty upon certain articles, whether coming from the United States or other countries, much greater than the duty provided by the general tariff law then in force. This was a discrimination against the Hawaiian ports wholly inconsistent with the revenue clauses of the Constitution, if such clauses were there operative.

And Mr. Justice White, with whom Mr. Justice Shiras and Mr. Justice McKenna concurred, said (bottom page 304):

> By joint resolution of Congress the Hawaiian Islands came under the sovereignty of the United States in 1898; and on April 30, 1900, an act for the government of Hawaii was approved, by which the Hawaiian Islands were given the status of an incorporated territory.

In this connection, it may be well to point out that the provision that "no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands," is totally inconsistent with the theory that Congress intended by the resolution to incorporate the islands as an integral part of the United States, or extend the Constitution over them.

III.

It is urged that the use of the qualifying words "not contrary to the Constitution of the United States," after the words "the municipal legislation of the Hawaiian Islands," carried the Constitution into the islands and rendered void and inoperative every provision of the law of the Hawaiian Islands contrary to any of its limitations. If this be true, then the qualifying clause nullified the express and positive provision. The Hawaiian method of indicting and convicting criminals was an integral part of the criminal law of the islands. The resolution provided that the existing "municipal legislation" should remain in force until

Congress should otherwise determine. There was no provision for modifying or amending it. The transfer took place after the legislature had adjourned, and, by subsequent Executive order of President McKinley, the election of another legislature was indefinitely postponed. To strike down the law of criminal procedure was to deprive the Government of Hawaii of the power to preserve order and protect persons and property. It is not to be presumed that either party to the contract of cession intended this. It is not to be presumed that the Government of the Republic of Hawaii was continued for the purpose of protecting persons and property and punishing crime, and yet at the same time deprived of the use of the law by which alone this could be done.

The interpretation placed by President McKinley upon the resolution of annexation appears in the instructions for the transfer of sovereignty (printed in the appendix), in which he directed "that the civil, judicial, and military powers in question shall be exercised by the officers of the Republic of Hawaii as it existed just prior to the transfer of sovereignty;" and in which, after referring in detail to the provisions of the resolution, he said:

> *Under these various provisions, the government of the islands will proceed without interruption.*

I call particular attention to the fact that the government during the transition period was not a new government, created by the President of the United States, but the existing government continued in the

exercise of all its powers, under the resolution, until Congress should organize the islands. This clearly appears in the report of the transfer of sovereignty, printed in the appendix. The question was discussed whether the officers of the Republic should take an oath of office as well as of allegiance. After President Dole and his colleagues had considered the point they advised Mr. Sewall that they had decided that all that was meant by the instructions and all that was necessary was an oath of allegiance.

> They were not elected nor appointed under the President of the United States, but were continued in the exercise of the duties of offices they already held and which it was the intention of the joint resolution and of my [Sewall's] instructions under them should not lapse.

Another question arising under the instructions was whether the proclamation should be addressed to the government and people, or to the people of Hawaii.

> After full consideration, the President agreeing, it was determined to address it to the government and people, on the theory that the government continued with the change of sovereignty without interruption.

The fact of the uninterrupted continuance of the government of the Republic during the transition period is further supported by the following instruction to Minister Sewall:

> Upon the completion of the formalities of the transfer, your functions as envoy extraordinary and minister plenipotentiary to Hawaii will nec-

> essarily cease. The President, however, directs that you shall for the time being remain in Hawaii as a special agent to conduct correspondence between the Government of the United States and the Government of Hawaii. Your correspondence will be conducted with the Department of State.

The status in the islands after the transfer of sovereignty under the resolution, is thus described by the supreme court of Hawaii in the *Edwards case* (11 Haw., Rep., 571, 578):

> The President of the United States, acting under the Newlands resolution, proclaimed that the government of the Hawaiian Islands "shall continue without interruption." No new scheme of government has been provided for these islands. The constitution and existing laws, therefore, must continue. It was so contemplated by the letter of the resolution itself. Its legal effect is that the sovereignty of Hawaii passed to the United States, while the laws of Hawaii were continued by the new sovereignty for the time being and until a new system of government and laws could be made for us. It must be so, or we would have no law. But it is urged that some of our municipal legislation is contrary to the Constitution of the United States, and that, particularly, the trial of the defendant without presentment by a grand jury is contrary to the fifth amendment to the Constitution of the United States, and that the verdict, not being unanimous, is inconsistent with the fourteenth amendment, because the conviction was not had by "due process of law." A

complete answer to these propositions is that there is no Hawaiian statute authorizing a grand jury or requiring unanimity of the jury in their verdicts, and to adopt these provisions in our criminal procedure without a statute authorizing them would violate the letter of the Newlands resolution, which continues our laws and does not make new ones for us.

IV.

If Congress had intended, by the resolution of annexation, to extend to the Hawaiian Islands our grand and petit jury system, it would have made some provision to that end. The omission indicates the lack of intention, which is confirmed by the provision contained in the organic act "To provide a government for the Territory of Hawaii," passed April 30, 1900. (31 Stat., 141.) In this measure Congress provided that the islands shall be known as the Territory of Hawaii (sec. 2); established a Territorial government (sec. 3); made all persons who were citizens of the Republic of Hawaii on August 12, 1898 (the date of the transfer of sovereignty), citizens of the United States (sec. 4); and provided that the Constitution and laws of the United States not locally inapplicable, with certain exceptions, should have the same force and effect within said Territory as elsewhere within the United States (sec. 5). The organization of the islands, their incorporation as a Territory of the United States, and the extension to them of the Constitution and laws of the United States, necessarily brought them, and for the first time, within the operation of the

fifth and sixth amendments, and therefore required the enactment of the following section, amending the law of civil and criminal procedure so as to extend our grand and petit jury system there.

> SEC. 83. That the laws of Hawaii relative to the judicial department, including civil and criminal procedure, except as amended by this act, are continued in force, subject to modification by Congress or the legislature. The provisions of said laws or any laws of the Republic of Hawaii which require juries to be composed of aliens or foreigners only, or to be constituted by impaneling natives of Hawaii only, in civil and criminal cases specified in said laws, *are repealed*, and all juries shall *hereafter* be constituted without reference to the race or place of nativity of the jurors; but no person who is not a male citizen of the United States and twenty-one years of age and who can not understandingly speak, read, and write the English language shall be a qualified juror or grand juror in the Territory of Hawaii. No person *shall* be convicted in any criminal case *except by unanimous verdict of the jury*. No plaintiff or defendant in any suit or proceeding in a court of the Territory of Hawaii shall be entitled to a trial by a jury impaneled exclusively from persons of any race. Until otherwise provided by the legislature of the Territory, grand juries may be drawn in the manner provided by the Hawaiian statutes for drawing petty juries, and shall sit at such times as the circuit judges of the respective circuits shall direct; the number of grand jurors in each circuit shall be not less than thirteen,

and the method of the presentation of cases to said grand jurors shall be prescribed by the supreme court of the Territory of Hawaii. *The several circuit courts may subpœna witnesses to appear before the grand jury* in like manner as they subpœna witnesses to appear before their respective courts.

Now, if, by the resolution of annexation, the Constitution was extended to the islands, and our grand-jury and petit-jury system put in force there, why were these provisions *inaugurating* our grand-jury and petit-jury system inserted in the organic act? All these provisions look to the future. It is obvious that Congress, in making them, acted in the belief that the Hawaiian law with respect to indictments and verdicts had continued in force during the transition period and would remain operative until the organic act should take effect.

V.

But what was the meaning and effect of the qualifying words "not contrary to the Constitution of the United States," used in the resolution? It is argued they must be held to extend the Constitution, with all its limitations, or be rejected altogether. No such alternative exists. The words had a meaning, and the meaning is plain. They were not employed to extend the Constitution. Before the islands could be incorporated and the Constitution with all its limitations extended, it was necessary that a new government should be framed and an organic act passed. But by

the transfer of sovereignty, the bringing of the islands under the sovereign dominion of the United States, certain limitations of the Constitution became operative there. These qualifying words were inserted in recognition of the fact that there are certain fundamental rights which the Constitution protects wherever the sovereignty of the United States extends. The nature of these rights, and of the limitations which for their protection apply wherever the flag flies, was discussed by me in the Insular Tariff cases. I refer the court to the portion of my argument printed in 182 U. S., pages 152 to 159. But the right to be indicted by a grand jury and tried by a petit jury does not come within this category. The distinction between natural or fundamental rights and artificial or remedial rights, under the Constitution, is pointed out by Mr. Justice Brown in the opinion in the *Downes case* (182 U. S., 282).

> We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of

justice; to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage (*Minor* v. *Happersett*, 21 Wall., 162), and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals.

Whatever may be finally decided by the American people as to the *status* of these islands and their inhabitants—whether they shall be introduced into the sisterhood of States or be permitted to form independent governments—*it does not follow that, in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution, and subject to the merely arbitrary control of Congress.*

I do not know whether there were any provisions of the Hawaiian law inconsistent with those prohibitions and limitations of the Constitution which apply everywhere; but if there were, they were contrary to the Constitution and became inoperative upon the transfer of sovereignty.

An analysis of the paragraph providing for the continuance in force of the municipal legislation of the islands will demonstrate that all the qualifying clauses

flow of necessity from other provisions of the resolution. They explain the effect and carry out the purpose of the other provisions. They do not abrogate or nullify them. The full paragraph is as follows:

> The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Following the provision that the existing treaties of the Hawaiian Islands with foreign nations should cease and determine, being replaced by the treaties between the United States and such nations, the positive provision is as follows:

> The municipal legislation of the Hawaiian Islands * * * shall remain in force until the Congress of the United States shall otherwise determine.

Where I have placed the stars were inserted the following qualifying clauses, each of which follows naturally and irresistibly from other provisions of the resolution:

(*a*) "*Not enacted for the fulfillment of the treaties so extinguished;*" obviously such legislation fell with the treaties.

(*b*) "*Not inconsistent with this joint resolution;*" because the resolution contains certain provisions inconsistent with the existing law of Hawaii; for example, the provision regulating Chinese immigration.

(*c*) "*Nor contrary to the Constitution of the United States;*" because by the cession the Hawaiian Islands were made subject to the sovereign dominion of the United States, and there are certain limitations of the Constitution which apply to every place subject to the jurisdiction of the United States; and

(*d*) "*Nor to any existing treaty of the United States;*" because the resolution substituted these treaties for the Hawaiian treaties.

All of these qualifying clauses are merely declaratory of what follows irresistibly from other provisions of the resolution. If they had been omitted, the meaning of the resolution would be the same. They were inserted simply for the sake of clearness. They explained but did not enact.

VI.

That the right to be indicted by a grand jury and be tried by a petit jury is not fundamental, that the fifth and sixth amendments enforcing this right apply only to the Federal courts, and that a citizen of the United States in a criminal prosecution in a State

court may be deprived of his life, liberty, or property, by due process of law, without indictment by a grand jury and without unanimity in the verdict of a petit jury, is the established doctrine of this court.

In *Brown* v. *New Jersey* (175 U. S., 172), Mr. Justice Brewer, speaking for the court, said (page 175):

> The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. (*Ex parte Reggel*, 114 U. S., 642; *Iowa Central Railway* v. *Iowa*, 160 U. S., 389; *Chicago, Burlington and Quincy Railroad* v. *Chicago*, 166 U. S., 226.) "The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury and on the other side no such right. Each State prescribes its own modes of judicial proceeding." (*Missouri* v. *Lewis*, 101 U. S., 22, 31.)
>
> The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named, it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary. For instance, while at the common law an indictment by the grand

> jury was an essential preliminary to trial for felony, it is within the power of a State to abolish the grand jury entirely and proceed by information. (*Hurtado* v. *California*, 110 U. S., 516.)

In *Bolln* v. *Nebraska* (176 U. S., 83) the court, speaking by Mr. Justice Brown, said (p. 88):

> This court has also repeatedly held that the first eight amendments to the Constitution applied only to the Federal courts, and it certainly could never have been intended that these amendments should be imposed upon Nebraska, and thereby a hard and fast rule made for that State that would forever preclude amendments inconsistent with the Bill of Rights of the Federal Constitution, and which this court has held to be applicable only to Federal courts. As we have repeatedly held, the fourteenth amendment was not intended to curtail the powers of the States to so amend their laws as to make them conform to the wishes of their citizens, to changed views of administration, or to the exigencies of their social life.

In *Maxwell* v. *Dow* (176 U. S., 581) the court goes into the question of what are the privileges and immunities of a citizen of the United States which no State can abridge, putting the question thus (top p. 586):

> Do they include the right to be exempt from trial for an infamous crime in a State court and under State authority except upon presentment by a grand jury? And do they also include

the right in all criminal prosecutions in a State court to be tried by a jury composed of twelve jurors?

The court, Mr. Justice Peckham delivering the opinion, points out that there are certain privileges and immunities which may not be abridged, but reaches the conclusion that these rights are not among them (p. 604):

> It appears to us that the questions whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether in case of an infamous crime a person shall only be liable to be tried after presentment or indictment of a grand jury, are eminently proper to be determined by the citizens of each State for themselves, and do not come within the clause of the amendment under consideration, so long as all persons within the jurisdiction of the State are made liable to be proceeded against by the same kind of procedure and to have the same kind of trial, and the equal protection of the laws is secured to them. (*Caldwell* v. *Texas*, 137 U. S., 692; *Leeper* v. *Texas*, 139 U. S., 462.) It is emphatically the case of the people, by their organic law, providing for their own affairs, and we are of opinion they are much better judges of what they ought to have in these respects than anyone else can be. The reasons given in the learned and most able opinion of Mr. Justice Matthews, in the *Hurtado case*, for the judgment therein rendered, apply with equal force in regard to a trial by a jury of less than twelve jurors. The right to be proceeded against only by indictment and the right to a

trial by twelve jurors, are of the same nature, and are subject to the same judgment, and the people in the several States have the same right to provide by their organic law for the change of both or either. Under this construction of the amendment there can be no just fear that the liberties of the citizen will not be carefully protected by the States respectively. It is a case of self-protection, and the people can be trusted to look out and care for themselves.

VII.

It thus appears that the Hawaiian Islands, in providing for indictment without a grand jury and for conviction without the unanimous verdict of a petit jury, was only doing what a State of the Union may do under the Constitution. In 1854, during the Administration of President Pierce, a draft of a treaty for the annexation of Hawaii was agreed upon, but, owing to the death of the King of the Hawaiian Islands, was not executed. This treaty provided for the incorporation of the Hawaiian Islands into the American Union as a State. By the resolution of annexation the islands were brought under the dominion of the United States, but it was not determined in what way they should be incorporated. Suppose Congress, upon the recommendation of the five commissioners provided for by the resolution, had decided, by the organic act, to admit the Hawaiian Islands into the Union as a State. Obviously this could have been done without changing in any respect the law of the islands regulating criminal procedure. As a State the government of the islands could have

continued, under the Constitution, to indict criminals without a grand jury and convict them without the unanimous verdict of a petit jury. With this power in Congress, can it be reasonably contended that Congress could not permit the government of Hawaii to continue to administer its own law of criminal procedure, until it should be determined in what way the islands should be incorporated into the United States? The condition of the islands during the transition period was suspensive, their future government and law undetermined. The sensible course under these circumstances was to permit the existing government to proceed without interruption until Congress could determine intelligently what ought to be done. And this is just what the resolution provided.

VIII.

The fifth and sixth amendments apply only to the courts of the United States. They contemplate organized Federal judicial districts. The courts of Hawaii during the transition period were not courts of the United States. They were the courts of the Republic of Hawaii, continued of necessity until Congress could organize the islands and establish Federal districts and Federal courts. The judicial powers which by express provision were to be exercised during the transition period were the existing judicial powers of the Hawaiian courts. These judicial powers did not include the power to impanel grand juries or to subpœna witnesses before grand juries, or to try criminals by a petit jury after the manner required in Federal

courts. There was no Hawaiian law for this, and therefore no judicial power. The judicial power which was continued under the resolution was the power to accuse and try and convict in the manner provided by the Hawaiian law and by that alone; and there was no authority to change or modify that law, for the resolution expressly provided that the municipal legislation of the islands should remain in force until Congress should otherwise determine.

Finally, let me point out that among the judicial powers exercised under the Republic of Hawaii and to be exercised during the transition period, was the power in the supreme court of the islands to pass finally upon all disputed questions of criminal procedure. This court was the only court which could decide such questions at that time. The question raised in the case at bar was unanimously determined by it in favor of the government. While I do not pretend to say that this decision is binding upon this court, I do submit that, under the peculiar circumstances, weight ought to be given to the views of the supreme court of Hawaii upon the matter.

JOHN K. RICHARDS,
Solicitor-General.

APRIL 12, 1902.

APPENDIX.

JOINT RESOLUTION TO PROVIDE FOR ANNEXING THE HAWAIIAN ISLANDS TO THE UNITED STATES (30 STAT., 750).

Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed *as a part of the territory of the United States and are subject to the sovereign dominion thereof,* and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided,* That all revenue from or proceeds of

the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Until Congress shall provide for the government of such islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner *as the President of the United States shall direct;* and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. *The municipal legislation of the Hawaiian Islands,* not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any exist ing treaty of the United States, *shall remain in force until the Congress of the United States shall otherwise determine.*

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands *the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.*

The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by

the Government of the United States; but the liability of the United States in this regard shall in no case exceed four million dollars. *So long, however, as the existing Government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided, said Government shall continue to pay the interest on said debt.*

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and *no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.*

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, *recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.*

SEC. 2. That the commissioners hereinbefore provided for shall be appointed by the President, by and with the advice and consent of the Senate.

SEC. 3. That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, and to be immediately available, to be expended at the discretion of the President of the United States of America, for the purpose of carrying this joint resolution into effect.

Approved July 7, 1898.

JULY 8, 1898.—DAY TO SEWALL.—INSTRUCTIONS FOR TRANSFER OF SOVEREIGNTY, ETC.

No. 145.] DEPARTMENT OF STATE,
Washington, July 8, 1898.

HAROLD M. SEWALL, Esq., etc.,
Honolulu, H. I.

SIR: I inclose herewith a copy of a joint resolution of Congress, approved by the President on July 7, 1898, entitled "Joint resolution to provide for annexing the Hawaiian Islands to the United States."

By the preamble to this resolution it is recited that the Government of the Republic of Hawaii has, in due form, signified its consent, in the manner provided by its constitution, "to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, government, or crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining."

These recitals, it will be observed, are made in the language of the treaty of annexation concluded at Washington on the 16th day of June, 1897. They, as well as the other terms of that treaty, were advisedly incorporated in the joint resolution, *because they embody the terms of cession which have not only been agreed upon by the two Governments, but which have also been ratified by the Government of the Republic of Hawaii.* The joint resolution therefore accepts, ratifies, and confirms on the part of the United States the cession

formally agreed to and approved by the Republic of Hawaii.

As by the adoption of the joint resolution the cession of the Hawaiian Islands and their dependencies to the United States is thus concluded, it is assumed that no further action will be necessary on the part of the Hawaiian Government beyond the formalities of transfer. Should that Government, however, desire to take any further action, formally confirmatory of what has been done, no objection will be interposed on the part of the United States.

When all preliminaries shall have been settled, you are instructed to accept, in the name of the United States, the formal transfer of the sovereignty and property of the Hawaiian Government, and to raise the American flag, with such suitable ceremonies as may be agreed on for the occasion. It may be advisable for the Hawaiian Government to deliver to you an inventory of the public property transferred to the United States.

There are several provisions of the joint resolution to which it is deemed proper specially to refer.

Until Congress shall provide for the government of Hawaii, "all the civil, judicial, and military powers exercised by the officers of the existing government" are to be vested in such person or persons, and to be exercised in such manner, as the President of the United States shall direct. In the exercise of the power thus conferred upon him by the joint resolution, the President hereby directs that the civil, judicial, and military powers in question shall be exercised by the officers of the Republic of Hawaii as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill the vacancies. All such officers will be required at once to take an oath

of allegiance to the United States, and all the military forces will be required to take a similar oath; and all bonded officers will be required to renew their bonds to the Government of the United States.

The powers of the minister of foreign affairs will, upon the transfer of the sovereignty and property of Hawaii to the United States, necessarily cease, so far as they relate to the conduct of diplomatic intercourse between Hawaii and foreign powers.

The municipal legislation of Hawaii, except such as was enacted for the fulfillment of the treaties between that country and foreign nations, and except such as is inconsistent with the joint resolution, or contrary to the Constitution of the United States or to any existing treaty of the United States, is to remain in force till the Congress of the United States shall otherwise determine. The existing customs relations of Hawaii with the United States and with other countries are to remain unchanged till Congress shall have extended the customs laws and regulations of the United States to the islands.

Under these various provisions, the government of the islands will proceed without interruption.

Upon the completion of the formalities of the transfer, your functions as envoy extraordinary and minister plenipotentiary to Hawaii will necessarily cease. *The President, however, directs that you shall for the time being remain in Hawaii as a special agent to conduct correspondence between the Government of the United States and the Government of Hawaii. Your correspondence will be conducted with the Department of State;* and, for the time during which your special agency may last, you will receive, out of the fund provided for carrying the joint resolution into effect, compensation at the same rate as heretofore.

As the joint resolution provides for the continuance for the present of the existing customs relations of Hawaii with the United States and other countries, the consul-general of the United States will, till further notice, continue to discharge his duties as heretofore.

These instructions will be borne to you by Rear-Admiral Joseph N. Miller, U. S. Navy, who will proceed to Honolulu in the U. S. S. *Philadelphia*, and who, together with the commander of the United States military forces present, will act with you in the ceremonies attending the formal transfer of the islands to the United States.

Respectfully, yours,

WILLIAM R. DAY.

AUGUST 15, 1898.—SEWALL TO DAY.—REPORT OF TRANSFER OF SOVEREIGNTY.

SPECIAL AGENCY OF THE UNITED STATES,
Honolulu, H. I., August 15, 1898.

Hon. W. R. DAY,
Secretary of State, Washington, D. C.

SIR: Referring to your instructions of July 8, 1898, and my dispatch No. 196 of August 8, 1898, I have the honor to report that the formal transfer of the sovereignty and property of the Hawaiian Government took place Friday, the 12th instant, the American flag being raised over the Government house at noon.

Upon receipt of your instructions above mentioned and in pursuance of them, I placed myself in communication with Admiral Miller, and discussed at length the preliminaries to be arranged. I also notified Maj. Gen. E. S. Otis, commanding independent division of Eighth Army Corps then here, that I was instructed to

confer with the commander of the United States military forces present, but his reply was that the interests of the service in his opinion demanded that the transports with the men under his command should be off as soon as possible. He added that the First New York Regiment would be here and that its commanding officer would be a fitting army representative. Accordingly, with Admiral Miller, Col. Thomas M. Barber, although his regiment had not arrived, acted with me at the ceremonies.

At the meeting with the President and cabinet reported in my dispatch above mentioned, after full discussion, it was decided that the ceremonies should open with the presentation to President Dole of the certified copy of the joint resolution. In accepting this he would relinquish the sovereignty and property of Hawaii, after which he would direct the Hawaiian flag to be hauled down. This was the suggestion of Admiral Miller and myself. I was then to accept the transfer and direct the Admiral to raise our flag, after which I would read a part of my instructions in the nature of a proclamation, and then the oath would be taken.

Later this order was changed by the introduction of a prayer, and I gave notice to the minister of foreign affairs that I might at the conclusion of reading my instructions make a short address. President Dole also consented to speak briefly at the drill grounds, when he would present an American flag to the Hawaiian troops, after they had taken the oath of allegiance.

In the course of the following days several questions came up for discussion and settlement.

The most important of these was the question of the oath. I told the attorney-general that, as he knew, all

the instructions called for was an oath of allegiance, but I pointed out that an oath of allegiance was not an oath of office, and I suggested for his consideration that it might be advisable to administer the oath of allegiance and of office. He said he would confer with his colleagues on the point. After he had done so, the President informed me that they had considered the point and had decided that all that was meant by the instructions and all that was necessary was an oath of allegiance. *They were not elected nor appointed under the President of the United States, but were continued in the exercise of the duties of offices they already held and which it was the intention of the joint resolution and of my instructions under them should not lapse.*

Next was the question, Who should administer the oath? It had been the original plan that I should administer the oath to the chief justice, and he in turn to the President and cabinet and members of the executive council. I stated that I could not find that I had the power to administer the oath, but that the secretary of legation had this power. After consideration of this point, the President said it was the preference of his Government that the chief justice administer the oath, that in their judgment he would be invested with his office as soon as I should read my instructions, and taking the oath himself was not a condition precedent. Moreover, this would agree with the procedure on the other islands, where the district magistrates were to administer the oaths.

The third question was, To whom should my instructions, which I was to read in the nature of a proclamation, be addressed—to the Government and people, or to the people of Hawaii? *After full consideration, the President agreeing, it was determined to*

address it to the Government and people on the theory that the Government continued with the change of sovereignty without interruption.

During the discussion of these questions President Dole called attention to the fact that the ratification on the part of Hawaii of the treaty of annexation which took place on the 11th day of September, 1897, had not yet been delivered to our Government, and proposed that this delivery be made a part of the ceremonies. I thought better not, and on the morning of the 12th, before the ceremonies, I received the document at the hands of the minister of foreign affairs and transmit it herewith.

The invitations and lesser details of the ceremonies were left to the Hawaiian Government. I especially requested that invitations be sent to ex-Queen Liliuokalani, Kapiolani the Queen Dowager, Kaiulani and her father, A. S. Cleghorn, ex governor of Oahu, also the Princes David and Cupid, nephews of Kalakaua. This was agreed to, but none of these invitations were accepted.

The details for the disposition of the naval forces were attended to by Admiral Miller.

The Hawaiian National Guard met our forces from the *Philadelphia* and *Mohican* at the boat landing and escorted them to the grounds of the Government House, the former palace; our men occupied the center of the driveway, to the right and left being companies of the Citizens' Guard of Honolulu, and the Hawaiian police and regimental forces.

At a quarter before 12 the ceremonies opened with prayer, at the conclusion of which I arose, addressing President Dole said:

"Mr. President, I present you a certified copy of a joint resolution of the Congress of the United States,

approved by the President on July 7, 1898, entitled 'Joint resolution to provide for annexing the Hawaiian Islands to the United States.'

"This joint resolution accepts, ratifies, and confirms on the part of the United States the cession formally consented to and approved by the Republic of Hawaii."

As I had written this and submitted it, it read "the cession formally 'agreed to'" the words used on the second page of my instructions. President Dole, however, preferred the words "consented to."

President Dole, taking the copy of the resolutions, said:

"*A treaty of political union having been made, and the cession formally consented to by the Republic of Hawaii having been accepted by the United States of America;* I now, in the interest of the Hawaiian body politic, and with full confidence in the honor, justice, and friendship of the American people, yield up to you as the representative of the Government of the United States, the sovereignty and public property of the Hawaiian Islands," and waving his hand to his chief of staff, the Hawaiian flag was saluted by the battery of the Hawaiian National Guard, in which salute our ships in the harbor joined. Then the Hawaiian band played Hawaii Ponoi for the last time, taps were sounded, and the Hawaiian flag came down, and was taken possession of by the Hawaiian corporal of the guard.

Then, replying to President Dole, I said:

"Mr. President: In the name of the United States, I accept the transfer of the sovereignty and property of the Hawaiian government.

"The admiral commanding the United States naval forces in these waters will proceed to perform the duty intrusted to him."

Thereupon the American flag was raised as the bands played the Star Spangled Banner and saluted. It floated from the staff at exactly fifteen seconds past 12 o'clock.

Then I read my instructions in the form I had arranged to do:

"*To the Government and people of the Hawaiian Islands:*

"By the terms of the joint resolution by which the cession of the Hawaiian Islands and their dependencies to the United States is concluded it is provided that until Congress shall provide for the government of Hawaii, all the civil, judicial, and military powers exercised by the officers of the existing Government are to be vested in such person or persons, and to be exercised in such manner, as the President of the United States shall direct.

"*In the exercise of the power thus conferred upon him by the joint resolution the President hereby directs that the civil, judicial, and military powers in question shall be exercised by the officers of the Republic of Hawaii*, as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill vacancies.

"*All such officers will be required at once to take an oath of* ALLEGIANCE *to the United States*, and all the military forces will be required to take a similar oath, and all bonded officers will be required to renew their bonds to the Government of the United States.

"The powers of the minister of foreign affairs will, upon the transfer of the sovereignty and property of Hawaii to the United States, necessarily cease so far as they relate to the conduct of diplomatic intercourse between Hawaii and foreign powers.

"*The municipal legislation of Hawaii*, except such as was enacted for the fulfillment of the treaties between

that country and foreign nations, and *except such as is* inconsistent with the joint resolution, or *contrary to the Constitution of the United States* or to any existing treaty of the United States, *is to remain in force till the Congress of the United States shall otherwise determine.*

"The existing customs relations of Hawaii with the United States, and with other countries, are to remain unchanged till Congress shall have extended the customs laws and regulations of the United States to the islands.

"*Under these various provisions, the government of the islands will proceed without interruption.*"

And at the conclusion of this said:

"Fellow countrymen: I congratulate you on the consummation this day records—a consummation, not a change—the inevitable consummation of the national policies and the natural relations between the two countries now formally and indissolubly united.

"Inevitable as has been this union, we may rejoice that it will take its place in history with the awakening of the American people to a sense of their responsibility among nations, in that splendid procession of events begun at Manila and which has now embraced these islands in its broad sweep.

"You are no strangers to your countrymen across the sea, bound to them as you are, by the achievements of their sons and brothers here, and by all the activities that make up a country's life. You are no strangers; certainly not in the momentous present. For as it comes to every nation in the dread ordeal of war to test the loyalty of all its sons and devotion of all its friends, so they have tested you, tried you, and found you true, when you refused to listen to the suggestions of the selfish and timid, and at your peril, offered up all that these islands had to offer, as a sacrifice on the altar of

devotion to a country you had not yet the right to call your own.

"And your countrymen can never forget that this loyalty and devotion and the opening of hearts and houses to our soldier boys that followed this, was the loyalty, the devotion, and the hospitality, not of Americans, though this were sweet indeed, but of men who sought to be Americans and had been denied, of men who founded a state for the purpose of admission to the American Union and had been denied, of men who presented this strange spectacle to the world that they stood ready, as you gentlemen about me to-day, to give up office, and power, and personal emoluments and glory, for the simple dignity of American citizenship. Even as you have given up a flag you love, and surrendered the sovereignty of these beautiful islands, that Hawaii may take her place, however humble that place may be, in the protecting circle of sovereign American States.

"This is the consummation you witness to-day, which you and your children's children will have the right to celebrate, and let there be no mistake as to its meaning. It means the triumph of no party or faction among you, the opportunity for no personal glorification or personal resentment, the confirmation in power of no authority over you that shall not commend itself to the sense of fairness and of justice of the representatives of the American people, but rather the burial of past prejudices, the obliteration of narrow divisions, and the ultimate political advancement of the humblest citizen over whom this flag shall float.

"But it is not for you to rest content in the enjoyment of free institutions. It is for you to help maintain them, to maintain them in the spirit they will be extended to you, in the spirit you have sought them,

in the spirit of fraternity and equality, in the spirit of the Constitution itself, now the supreme law of your land, to establish justice, to insure your tranquillity, to provide for the common defense, to promote your welfare, and to secure the blessings of liberty to yourselves and your posterity.

"This is the work before you, my countrymen, and I bid you advance to it. Hand in hand may you go, you of the home race, with those whose fathers' land this was, and whose generous virtues have won for them the regard of all mankind. Hand in hand may you go with them as they carry with them their unfaltering love of country into the broad plane of American citizenship.

"Advance to the uplifting and upbuilding of this land to prove it worthy to share the destiny of the great Republic.

"Empire may wait, indeed, but no hand save His who holds in the hollow of His hand the fate of nations can stay that destiny.

"God bless you, my countrymen.

"God bless the United States of America."

After this an oath of allegiance was administered by Chief Justice Judd, as follows:

"I do solemnly swear that I will support and defend the Constitution of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation or purpose of evasion. So help me God."

The brevity, impressiveness, and entirely official character of the cermonies have been generally commended, and have produced an excellent impression, especially among those who have felt hostile.

The official ceremonies being concluded, the Hawaiian troops took the oath of allegiance at the drill shed and were presented by President Dole with the flag carried by the *Boston's* battalion in the landing of our forces in 1893.

At the same time that the flag was raised on the Government House what is said to be the same flag that was lowered by order of Commissioner Blount from the judiciary building was raised there.

A proposition has been made and strongly indorsed to have the Hawaiian flag raised on one of the staffs as a territorial or local flag, but I said that my instructions did not make this possible.

In the afternoon the oath of allegiance was administered to the minor Government officials.

I inclose copies of newspapers.

I have the honor to be, sir, your obedient servant,

HAROLD M. SEWALL.

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